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Federal Communications Commission
Office of the Secretary

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FILE

In the Matter of)

Review of the Policy Implications)
of the Changing Video Marketplace)

MM Docket No. 91-221

REPLY COMMENTS OF CBS INC.

A number of Commenters in the above docket continue to cling to obsolete views of the video marketplace. Despite unchallenged evidence of the profound changes in the television industry over the past decade, they adhere to an image of a marketplace ruled by three broadcast networks whose operations must be restrained to provide room for other voices.

The most rhetorically striking expression of this "Old World" view of the television networks may be found in the Comments of the Association of Independent Television Stations, Inc. ("INTV"):

"[T]he networks remain the gorillas of the video marketplace. Smaller species may play at their feet; some may nip at their heels. Some may even feed at a trough once the exclusive domain of the gorilla, but none yet surpass the gorilla in strength and size."

Comments of INTV at 13.

The metaphorical comparison of the networks to gorillas is perhaps apt, but not in the sense intended by INTV. Like gorillas, the traditional broadcast networks may remain large and impressive figures, but their domain has shrunk severely as formidable rivals crowd their habitat. Indeed, some would view the broadcast networks as an endangered species and question their long-term survival.

In the past ten years, the terrain of television has undergone a dramatic transformation. Satellite delivery of programming on a regional and national scale, multifold expansion of cable channel capacity, the arrival and profusion of VCR's, and a sharp increase in the number of broadcast stations -- all of this has produced profound and irreversible changes in the television world. And in this changed environment, competitors to the networks have emerged and flourished -- not only the "smaller species" charmingly invoked by INTV, but also rivals as large and larger than the networks themselves. These include giant entertainment conglomerates, like Time-Warner, whose reach encompasses both programming and cable systems; a new network, Fox, itself a far-flung entertainment colossus; and an array of cable programmers and operators, program syndicators, and broadcast station group owners whose resources are a potent match for

the networks in competition for audience and revenues.

The broadcast networks, however, are handicapped in their efforts to defend their shrinking territory. Unlike their challengers, they remain partially shackled -- a remnant of the age when such constraints were thought necessary to ensure that they not run roughshod over their then-vulnerable competitors. Now those competitors have grown up and are more than able to survive on their own. The shackles nevertheless remain -- serving no useful purpose but to further hamper the networks' ability to adapt and compete.^{1/}

The Office of Plans and Policy Working Paper^{2/} and the

^{1/} The Fox story attests to both the burdensomeness and the unfairness of the special network constraints. Fox, of course, has achieved virtually universal broadcast coverage through affiliation agreements and functions as a network for all purposes but one -- the special regulatory constraints on network operations. Through careful limitations on its weekly programming hours and timely requests for waivers, Fox has managed to avoid application of those rules -- for example, to its first-run syndication operations and to the subsequent syndication of off-Fox programming in prime time access periods foreclosed to off-network shows.

^{2/} Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996 (1991)(Office of Plans and Policy Working Paper #26).

Comments previously filed in this proceeding by CBS and others document the steep decline in the audience and revenue shares of the three networks, and the rising shares of other broadcast outlets and cable, over the past decade. We simply repeat here what all of this should make clear: in television's new and future world, old restraints on the networks are unnecessary to protect or promote new competitors and significantly compromise the continuing ability of the networks to provide universal, free service containing top-quality news, sports, and entertainment programs.

We do not seek special benefits for the networks, or for broadcasters. What we ask is the removal of special constraints and burdens that needlessly hobble us. Deletion of antiquated restraints on station ownership, affiliate compensation structures, and use of off-network programming in prime time access, and elimination of broadcasters' coerced subsidization of cable systems through enactment of a retransmission consent scheme -- these are not grants of special privilege to the networks or broadcasters, but relief from onerous and unnecessary special handicaps.

* * *

We will not here engage in a comprehensive rebuttal of specific arguments raised by other Commenters, since the issues have been rehearsed at length in opening Comments and in other dockets and proceedings. We would like, however, to offer a few additional observations:

1. We did not specifically address dual networking in our opening Comments because the issue is not at this time a primary regulatory or business goal of CBS. In principle, however, we agree with the arguments for repeal of the rule advanced by the National Association of Broadcasters, Capital Cities/ABC, Inc., National Broadcasting Company, Inc., and others in their Comments.

2. The Office of Communication of the United Church of Christ ("OC/UCC") errs in suggesting that only an independently owned station can supply a unique voice and add to the overall diversity of media sources. OC/UCC Comments at 14-16. Commonly owned stations quite obviously can and do contribute powerfully to the diversity of programming and viewpoints available to the public in their respective markets. This is true not only with regard to commonly owned

stations in different markets, but also to commonly owned stations within a market, or in adjoining service areas -- witness the typically diverse contributions made by jointly owned AM/FM or radio/television stations in a given market (not to mention, of course, commonly owned cable programming channels serving the same cable systems). The key question is not ownership but content -- and, in today's fiercely competitive video world, market forces increasingly dictate that each media outlet seek to establish for itself a distinctive voice and character.

3. The OC/UCC also errs in gauging service to the public on the basis of the quantity of locally produced news or public affairs programming. OC/UCC Comments at 12-14. National and regional programming, no less than that which is locally produced, can contribute powerfully to every community's understanding and discussion of issues of great interest and importance. Certainly, the broadcast network news divisions have played a central role in bringing news, information, and diverse viewpoints to the American public, both in their regular programming -- daily newscasts, news magazines, news interview programs, and documentaries -- and in their extended coverage of the major breaking news events of the past four decades. Network and group-owned stations

offer the special benefits of a combination of national and local news and public affairs programming -- all of it contributing to the multitude of editorial alternatives available to the public.^{3/}

4. Some commenters speak of the affiliate-network relationship as if it were still weighted almost entirely toward the networks. See, e.g., Comments of the Network Affiliated Stations Alliance ("NASA") at 16-21; Comments of INTV at 12-14, 32-33. As the network affiliates acknowledge, however, this relationship, and its balance of interests and leverage, is highly complex and varies from market to market. NASA Comments at 16-17. We would note, though, that the rise of a fourth alternative network (Fox) whose programming sometimes bests that of one or more traditional networks; the increasing availability and popularity of first-run syndicated programming; and the rising strength of local advertising as opposed to national have all contributed to additional leverage on the part of affiliates. Affiliate

^{3/} Despite the OC/UCC's assertion of a drop-off in broadcasters' service to the public, their own figures show a marked increase since 1974 in the total amount of news and public affairs programming offered by stations in their randomly selected markets -- from 19.6 percent (6 AM to midnight) in 1974 to 21.62 percent in 1980. OC/UCC Comments at Charts I & III.

clout is evidenced in the continuing high levels of local preemption of network programming; in the complex compromises and negotiations involved in the ongoing discussion of individual affiliates' compensation levels; and in recent decisions by ABC and NBC to cease offering network programming in time slots with especially low affiliate clearance levels (midnight to 1 AM for ABC, 10 to 11 AM for NBC). Finally, as we discussed in our opening comments, the great majority of affiliate preemptions of network programs are not for news, public affairs, or other programs "of greater local or national importance," as envisioned in the rules. See 47 C.F.R. § 73.658(e). Instead, most preemptions are for entertainment programming chosen on the basis of purely economic concerns. What CBS has recommended in its initial Comments is a more flexible, pragmatic and realistic approach to this essentially economic question, one which allows the networks to negotiate with their affiliates a system of compensation which more closely ties payment to levels of clearance of network programming.

5. The National Cable Television Association, Inc. ("NCTA") asserts in its Comments that a system of retransmission consent for cable carriage of local broadcast signals would grant broadcasters "the unilateral right to

pick the pockets of cable subscribers and operators." NCTA Comments at 27. NCTA has it backwards; it is cable operators who under current law are able to lift local broadcasters' product and sell it, for profit, without compensation to the broadcaster. The cable operator, not the broadcaster, is the pickpocket -- exploiting the broadcaster's copyrighted newscasts and other owned programs, its program packaging and scheduling, its promotional efforts and community good will, all without paying the broadcaster a cent.

NCTA also suggests that a retransmission consent scheme would be unworkable because of difficulties in obtaining retransmission rights from the copyright holders. Id. at 31-32. Such difficulties would, of course, be non-existent if the cable compulsory license remained in effect, coupled with a retransmission consent provision, as envisioned in pending bills S. 12 and H.R. 3380.


Finally, NCTA suggests that the basic principle of retransmission consent is somehow at odds with broadcasters' responsibility to make their programming universally available to viewers in their service area. Id. at 30-31. Whether or not a broadcaster grants retransmission consent to a cable operator, and on what terms, the broadcaster will in

any event provide its community with free over-the-air service. The only question is whether it must also subsidize the local cable system by handing over its signal for the cable system's resale without any compensation. Such a forced subsidy may have had a purpose when cable was a struggling infant; today, a robust cable industry needs no governmentally imposed hand-outs from its broadcast competitors.

Respectfully submitted,

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